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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VERONICA CHAR,) Case No. ED CV 16-0745 FMO (SPx)
Plaintiff,)
v.) **ORDER REMANDING ACTION**
WENDY'S INTERNATIONAL LLC, F/K/A/)
WENDY'S INTERNATIONAL, INC., et)
al.,)
Defendants.)

)

On November 19, 2015, Veronica Char ("plaintiff") filed a Complaint in the Superior Court of the State of California for the County of San Bernardino against Wendy's International LLC ("defendant") Does 1 through 20. (See Notice of Removal ("NOR") at ¶ 5 & Exhibit ("Exh.") A ("Complaint"). On April 20, 2016, defendant removed that action on diversity jurisdiction grounds pursuant to 28 U.S.C. § 1332. (See NOR at ¶ 9).

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute[.]" Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994). The courts are presumed to lack jurisdiction unless the contrary appears affirmatively from the record. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n. 3, 126 S.Ct. 1854, 1861 (2006). Federal courts have a duty to examine jurisdiction sua sponte before proceeding to the merits of a case, see Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583, 119

1 S.Ct. 1563, 1569 (1999), “even in the absence of a challenge from any party.” Arbaugh v. Y&H
 2 Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 1244 (2006).

3 “The right of removal is entirely a creature of statute and a suit commenced in a state court
 4 must remain there until cause is shown for its transfer under some act of Congress.” Syngenta
 5 Crop Protection, Inc. v. Henson, 537 U.S. 28, 32, 123 S.Ct. 366, 369 (2002) (internal quotation
 6 marks omitted). Where Congress has acted to create a right of removal, those statutes, unless
 7 otherwise stated, are strictly construed against removal jurisdiction.¹ See id. Unless otherwise
 8 expressly provided by Congress, “any civil action brought in a State court of which the district
 9 courts of the United States have original jurisdiction, may be removed by the defendant or the
 10 defendants, to the district court[.]” 28 U.S.C. § 1441(a); see Dennis v. Hart, 724 F.3d 1249, 1252
 11 (9th Cir. 2013) (same). A removing defendant bears the burden of establishing that removal is
 12 proper. See Abrego Abrego v. The Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006) (per
 13 curiam) (noting the “longstanding, near-canonical rule that the burden on removal rests with the
 14 removing defendant”); Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (“The strong
 15 presumption against removal jurisdiction means that the defendant always has the burden of
 16 establishing that removal is proper.”) (internal quotation marks omitted). Moreover, if there is any
 17 doubt regarding the existence of subject matter jurisdiction, the court must resolve those doubts
 18 in favor of remanding the action to state court. See Gaus, 980 F.2d at 566 (“Federal jurisdiction
 19 must be rejected if there is any doubt as to the right of removal in the first instance.”).

20 “Under the plain terms of § 1441(a), in order properly to remove [an] action pursuant to that
 21 provision, [the removing defendant] must demonstrate that original subject-matter jurisdiction lies
 22 in the federal courts.” Syngenta Crop Protection, 537 U.S. at 33, 123 S.Ct. at 370. Failure to do
 23 so requires that the case be remanded, as “[s]ubject matter jurisdiction may not be waived, and.
 24 . . . the district court must remand if it lacks jurisdiction.” Kelton Arms Condo. Owners Ass’n, Inc.

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 26 ¹ Given Congress’s intent to facilitate adjudication of certain class actions in federal court, an
 27 “antiremoval presumption” does not exist in cases removed pursuant to the Class Action Fairness
 28 Act (“CAFA”), 28 U.S.C. § 1332(d). See Dart Cherokee Basin Operating Co., LLC v. Owens, 135
 S.Ct. 547, 554 (2014).

v. Homestead Ins. Co., 346 F.3d 1190, 1192 (9th Cir. 2003). Indeed, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c); see Enrich v. Touche Ross & Co., 846 F.2d 1190, 1194 n. 2 (9th Cir. 1988) (“It is elementary that the subject matter jurisdiction of the district court is not a waivable matter and may be raised at anytime by one of the parties, by motion or in the responsive pleadings, or sua sponte by the trial or reviewing court.”); Washington v. United Parcel Serv., Inc., 2009 WL 1519894, *1 (C.D. Cal. 2009) (a district court may remand an action where the court finds that it lacks subject matter jurisdiction either by motion or sua sponte).

The court’s review of the NOR and the attached state court Complaint makes clear that this court does not have subject matter jurisdiction over the instant matter.² See 28 U.S.C. § 1441(a); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429 (1987) (“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.”) (footnote omitted). In other words, plaintiff could not have originally brought this action in federal court, as plaintiff does not competently allege facts supplying diversity jurisdiction. See 28 U.S.C. § 1332(a).³

In order to reach the \$75,000 jurisdictional threshold, defendant relies on plaintiff’s claim for attorney’s fees. (See NOR at ¶¶ 30-31). “[W]here an underlying statute authorizes an award of attorneys’ fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy.” Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 1000 (9th Cir. 2007), overruled on other grounds as recognized by Rodriguez v. AT & T Mobility Serv. LLC, 728 F.3d 975, 976-77 (9th Cir. 2013). “[C]ourts are split as to whether only attorneys’ fees that have accrued at the time of removal should be considered in calculating the amount in controversy, or whether the calculation should take into account fees likely to accrue over the life of the case.” Hernandez v. Towne Park, Ltd., 2012 WL 2373372, *19 (C.D. Cal. 2012) (collecting cases); see

² Defendant seeks only to invoke the court’s diversity jurisdiction. (See, generally, NOR).

³ In relevant part, 28 U.S.C. § 1332(a) provides that “district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States[.]”

1 Reames v. AB Car Rental Servs., Inc., 899 F.Supp.2d 1012, 1018 (D. Or. 2012) (“The Ninth
 2 Circuit has not yet expressed any opinion as to whether expected or projected future attorney fees
 3 may properly be considered ‘in controversy’ at the time of removal for purposes of the diversity-
 4 jurisdiction statute, and the decisions of the district courts are split on the issue.”). The court is
 5 persuaded that “the better view is that attorneys’ fees incurred after the date of removal are not
 6 properly included because the amount in controversy is to be determined as of the date of
 7 removal.” Dukes v. Twin City Fire Ins. Co., 2010 WL 94109, *2 (D. Ariz. 2010) (*citing Abrego*
 8 Abrego, 443 F.3d at 690). Indeed, “[f]uture attorneys’ fees are entirely speculative, may be
 9 avoided, and are therefore not ‘in controversy’ at the time of removal.” *Id.* at *2; *accord Palomino*
 10 v. Safeway Ins. Co., 2011 WL 3439130, *2 (D. Ariz. 2011).

11 Here, defendant provides no evidence of the amount of attorney’s fees that were incurred
 12 at the time of removal. (*See, generally*, NOR at ¶¶ 30-31). Thus, defendant has not shown by
 13 a preponderance of the evidence that the inclusion of attorney’s fees in the instant case would
 14 cause the amount in controversy to reach the \$75,000 threshold. See Walton v. AT & T Mobility,
 15 2011 WL 2784290, *2 (C.D. Cal. 2011) (declining to reach the issue of whether future attorney’s
 16 fees could be considered in the amount in controversy because the defendant “did not provide any
 17 factual basis for determining how much attorney’s fees have been incurred thus far and will be
 18 incurred in the future[, and] [b]ald assertions are simply not enough.”).

19 Given that any doubt regarding the existence of subject matter jurisdiction must be resolved
 20 in favor of remanding the action to state court, see Gaus, 980 F.2d at 566, the court is not
 21 persuaded, under the circumstances here, that the removing defendants have met their burden.
 22 Therefore, there is no basis for diversity jurisdiction.

23 **This order is not intended for publication. Nor is it intended to be included in or**
 24 **submitted to any online service such as Westlaw or Lexis.**

25 Based on the foregoing, IT IS ORDERED that:

26 1. The above-captioned action shall be **remanded** to the Superior Court of the State of
 27 California for the County of San Bernardino, 247 West Third Street, San Bernardino, CA 92415,
 28 for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c).

2. The Clerk shall send a certified copy of this Order to the state court.

Dated this 23rd day of May, 2016.

/s/

Fernando M. Olguin
United States District Judge